

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Stephen Chan

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY
and
UNITED STATES CUSTOMS AND
BORDER PROTECTION

Defendants.

CASE NO. [Case #]

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. Plaintiff brings this action to redress violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. This action challenges the Defendants’ failure to respond to Plaintiff’s FOIA request by disclosing all responsive records in the manner and within the time limits mandated by FOIA.

2. Defendants are unlawfully withholding information sought by Plaintiff, information to which he is entitled and for which no valid disclosure exemption applies. Defendants failed to

1 comply with the statutory mandates and deadlines imposed by FOIA. Accordingly, Plaintiff
2 seeks declaratory relief establishing that Defendants have violated the Freedom of Information
3 Act. Plaintiff also seeks injunctive relief directing Defendants to promptly provide Plaintiff with
4 the requested information.

5 **II. PARTIES**

6 3. Plaintiff Stephen Chan, is an individual, and at all times relevant herein, has resided in
7 Canada where he is employed by Graymont Limited as a Logistics Specialist since 2011.
8 Graymont is headquartered in Canada and is a leading producer of quicklime, with facilities
9 throughout Canada and the United States. As a Canadian employee of Graymont Limited, Mr.
10 Chan seeks to enter the United States on a periodic and temporary basis to meet with Graymont
11 managers concerning company operations. On September 11, 2012, Mr. Chan submitted a FOIA
12 request to Defendants in order to determine the reason for being repeatedly referred to secondary
13 questioning or refused admission, for no apparent reason, when applying for entry into the
14 United States at ports under the jurisdiction of CBP managers at Seattle, and on November 17,
15 2012, being told by a CBP officer at Galveston that he needed to apply for a waiver in order to
16 enter in the future or he would be banned for five years. Mr. Chan is unaware of any reason that
17 he would be inadmissible to the United States and has no idea what kind of waiver would be
18 needed in order to carry out his lawful business in the United States.

19 4. Defendant Department of Homeland Security (“DHS”) is a department of the
20 executive branch of the United States government and is an agency within the meaning of 5
21 U.S.C. § 552(f). DHS is responsible for enforcing federal immigration laws and has possession
22 and control over the records sought by Mr. Chan.

23 5. Defendant Customs and Border Protection (“CBP”) is a component of DHS and is an
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1 agency within the meaning of 5 U.S.C. § 552(f). Among other duties, CBP is responsible for
2 enforcing immigration laws at and between ports of entry to the United States. CBP has
3 possession and control over the records sought by Mr. Chan.

4 **III. JURISDICTION**

5 6. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B)
6 (Freedom Of Information Act), 5 U.S.C. §702, §704 and §706 (Administrative Procedure Act),
7 and 28 U.S.C. §1331 (federal question).

8 **IV. VENUE**

9 7. Venue is proper in the Western District of Washington under 5 U.S.C. 552(a)(4)(B)
10 and 28 U.S.C. § 1391(e).

11 **V. REMEDY SOUGHT**

12 8. Mr. Chan seeks to have the Court compel Defendants to produce any and all
13 nonexempt records responsive to his FOIA request. Declaratory relief is appropriate under 28
14 U.S.C. § 2201. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. §
15 552(a)(4)(B).

16 **VI. LEGAL FRAMEWORK RELEVANT TO THE CLAIMS**

17 9. “A popular Government, without popular information, or the means of acquiring it, is
18 but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern
19 ignorance: And a people who mean to be their own Governors, must arm themselves with the
20 power which knowledge gives.”¹ FOIA advances public access to information and diffusion of
21 knowledge by requiring, *inter alia*, that all federal agencies must promptly provide copies of all

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23 ¹ Letter from James Madison to W.T. Barry (August 4, 1822), in *The Writings of James Madison* (Gaillard Hunt
24 ed.).

1 non-exempt agency records to those persons who make a request for records that reasonably
2 describe the nature of the records sought, and which conforms to agency regulations and
3 procedures in requesting such records. 5 U.S.C. § 552(a)(3)(A).

4 10. FOIA further requires federal agencies to make a final determination on all FOIA
5 requests that it receives within twenty days after the receipt of such request, unless the agency
6 provides notice to the requester of “unusual circumstances” meriting additional time for a
7 response. 5 U.S.C. §552(a)(6)(A)(i).

8 11. FOIA expressly provides that a person shall be deemed to have exhausted their
9 administrative remedies if the agency fails to comply with the applicable time limitations
10 provided by 5 U.S.C. § 552(a)(6)(A)(i)-(ii). 5 U.S.C. § 552(a)(6)(c).

11 12. Any person who has not been provided the records requested pursuant to FOIA, after
12 exhausting their administrative remedies, may seek legal redress from the federal district court to
13 “enjoin the agency from withholding agency records and to order agency records improperly
14 withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

15 13. Pursuant to FOIA, this Court may award attorney fees and litigation costs against the
16 Defendants if Mr. Chan prevails in this action. 5 U.S.C. § 552(a)(4)(E).

17 **VII. STATEMENT OF FACTS**

18 14. On several occasions, and without providing an explanation, Defendants referred Mr.
19 Chan to secondary questioning when he applied for entry into the U.S. for personal visiting and
20 when he sought admission as a business visitor to attend business meetings as part of his
21 employment with Graymont.

22 15. The applications for admission as visitor occurred at the Vancouver B.C. International
23 Airport on June 20, 2011; October 18 and October 25, 2011; and February 8, 2012. Applications
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1 for admission for personal purpose occurred on November 17, 2011 and August 10, 2012. There
2 may be other entries or attempted entries which Plaintiff does not recall at present.

3 16. Mr. Chan retained an immigration attorney, Robert O. Wells, who attempted to gather
4 more information about Mr. Chan's problematic encounters with CBP by filing a FOIA request.

5 ***Plaintiffs' September 2012 FOIA Request to CBP FOIA Office***

6 17. On September 11, 2012, Mr. Chan, by and through his attorney Robert O. Wells, sent
7 by FedEx a FOIA request to CBP FOIA Division in Washington. The request explained that Mr.
8 Chan had been referred to secondary inspection on six different occasions.

9 18. On September 12, 2012, the CBP FOIA Office received the request. Defendants then
10 sent an undated letter postmarked September 19, 2012 acknowledging receipt of Mr. Chan's
11 FOIA request asking that he resubmit his request with a "reasonable description of the records
12 [you] are seeking."

13 ***Plaintiffs' September 2012 Second FOIA Request to CBP FOIA Office***

14 19. On September 26, 2012 Mr. Chan, by and through his attorney Robert O. Wells, sent
15 by FedEx a second letter to the CBP FOIA Office in Washington, restating the previous FOIA
16 request, attaching a copy of the original FOIA request, and providing a detailed description of
17 the records sought by Mr. Chan, relating to his several applications to enter the United States in
18 2011 and 2012.

19 ***Plaintiffs' December 3, 2012 FOIA Request to CBP's FOIA Office***

20 20. On December 3, 2012, Mr. Chan, by and through his attorney Robert O. Wells, sent
21 by Fedexa third letter to the CBP FOIA Office in Washington, referring to the September 2012
22 FOIA request and follow up letter, and further informing CBP that Mr. Chan was advised by
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1 CBP personnel when he sought entry that he must file an application for a waiver in order to be
2 admitted into the United States in the future.

3 ***Plaintiffs' December 2012 Second FOIA Request to CBP's FOIA Office***

4 21. On December 31, 2012, Plaintiff, by and through his attorney Robert O. Wells, sent
5 by FedEx a fourth letter to the CBP FOIA Office in Washington. The letter referred to the
6 September 2012 FOIA request and follow up letters, and indicated that Mr. Chan has not been
7 advised why he needs to seek a waiver of inadmissibility, or what evidence CBP has to conclude
8 that he is inadmissible into the United States.

9 ***Plaintiffs' February 20, 2013 FOIA Request to CBP's FOIA Office***

10 22. On February 20, 2013, Plaintiff, by and through their attorney Robert O. Wells,
11 mailed a fifth letter to the CBP FOIA Office in Washington. The letter requested a complete and
12 immediate response to the original request and follow up letters.

13 ***Plaintiff's May 14, 2013 Followup Fax and Email to CBP's FOIA Office***

14 23. On May 14, 2013, Plaintiff, by and through his attorney Robert O. Wells tried to
15 obtain a status report/response from the CBP FOIA office, using the published fax and email
16 addresses. The fax did not go through, and the email received a response that "this email address
17 is no longer accepting email."

18 24. As of the date of this filing, Mr. Chan has not received a final decision or adjudication
19 regarding his FOIA requests. Mr. Chan has not received any documents or affirmation that any
20 search has been conducted whatsoever with regard to the original request or follow up letters.

21 25. Over a year has passed and no substantive reply has been received. Mr. Chan treated
22 this as an adverse determination pursuant to 6 C.F.R. §5.6(C) and 5 U.S.C. §552(a)(6)(A).
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1 Therefore, Mr. Chan has fully exhausted all administrative remedies required by FOIA. 5 U.S.C.
2 §§ 552(a)(6)(A), (a)(6)(C).

3 **VIII. CLAIMS FOR RELIEF**

4 **COUNT 1 VIOLATION OF THE FOIA FAILURE TO PROVIDE RECORDS**

5 26. Mr. Chan realleges, as if fully set forth herein, paragraphs 1-25 previously set forth
6 herein. Mr. Chan has a statutory right to have Defendants process his FOIA request, and there is
7 no legal basis for the denial by the agency of said right. Mr. Chan's rights were violated when
8 Defendants unlawfully delayed their response to his information request beyond the
9 determination deadline imposed by FOIA, and refused to provide records without a lawful basis
10 for withholding.

11 27. Mr. Chan has been and will continue to be irreparably harmed because of Defendants'
12 unreasonable delay in providing the information requested under FOIA. Defendants' failure to
13 comply with the law is preventing Mr. Chan and his employer, Graymont Limited, from seeking
14 to enter the United States as a lawful visitor for business or pleasure without risk of being
15 subjected to expedited removal proceedings .

16 17 **COUNT 2 VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT**

18 28. Mr. Chan realleges paragraphs 1-25 previously set forth herein.

19 30. Defendants have unlawfully withheld agency action by failing to comply with the
20 mandates of FOIA consequent to its failure and refusal to issue a timely final determination on
21 Mr. Chan's request.

22 31. Defendants' failure to issue a timely final determination on Mr. Chan's information
23 request, as well as their failure to provide any documents in response to the request, has injured
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Mr. Chan's interests in determining the details and legal justification regarding his admissibility into the U.S. Said information is a necessary prerequisite in order to determine whether governmental misconduct occurred. Mr. Chan and his employer have waited over a year for any explanation surrounding CBP's request for a waiver. Defendants' failure and refusal to produce the information requested constitute a violation of Defendants' statutory duties under the APA.

32. Defendants' failure and refusal to issue a timely final determination on Mr. Chan's information request constitute agency action unlawfully withheld and unreasonably delayed and is therefore actionable pursuant to 5 U.S.C. §706(1).

33. Alternatively, Defendants' failure to issue a timely final determination on Mr. Chan's information request is in violation of FOIA's statutory mandates and is therefore arbitrary, capricious, or an abuse of discretion and not in accordance with law and is therefore actionable pursuant to 5 U.S.C. § 706(2).

IX. REQUESTED RELIEF

WHEREFORE, Mr. Chan respectfully request that this Court enter Judgment for Plaintiff providing the following relief:

A. Find that Defendants exceeded the legal response time of twenty days in 5 U.S.C. §552(a)(6)(A)(i) and failed to give written notice if a ten day extension was needed in the "unusual circumstances" set forth in 5 U.S.C. §552(a)(6)(B);

B. Enjoin Defendants from continuing to withhold any and all nonexempt records responsive to the request;

C. Order Defendants to conduct an adequate search for agency records responsive to Mr. Chan's FOIA Request within five working days of the date of the Court's Order in this matter;

- 1 D. Order Defendants to produce any and all nonexempt records responsive to Mr. Chan's
2 request and to prepare a *Vaughan* index of allegedly exempt records responsive to the
3 request within ten business days of the Court's Order in this matter;
- 4 E. Grant Mr. Chan a fee waiver for any costs associated with the production and delivery of
5 documents responsive to his request;
- 6 F. Award Mr. Chan the costs and reasonable attorney's fees incurred in this action pursuant
7 to 5 U.S.C. §552(a)(4)(E); and
- 8 G. Grant such other relief at law and in equity as the Court may deem just and proper.
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10 Respectfully submitted,

11 By: /s/ Robert H. Gibbs

12 Robert Gibbs

13 Attorney for Plaintiff

14 Gibbs Houston Pauw

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17 (206) 682-1080

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Dated: October 6, 2013